STATE OF MICHIGAN

COURT OF APPEALS

STEVEN JAMES, Personal Representative of the Estate of MARJORIE JAMES, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

W.A. FOOTE MEMORIAL HOSPITAL, and PHILLIP RICHARDS, M.D.,

Defendants-Appellees,

and

KHAWAJA IKRAM, M.D.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 19, 2006

No. 262622
Jackson Circuit Court
LC No. 03-006278-NH

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. Defendant Dr. Khawaja Ikram cross-appeals based on an alternative ground for summary disposition that the trial judge denied. We reverse.

This case arose when plaintiff's decedent, Marjorie James, presented at the emergency room of defendant W. A. Foote Memorial Hospital at around 4:40 a.m. on September 7, 2001, with complaints of severe left hip pain. She was admitted and defendant Dr. Phillip Richards, her family practice physician, testified in a deposition that he received a call from the emergency department of defendant hospital around 7:00 a.m. on September 7, 2001. Dr. Richards ordered consultations with defendant Dr. Ikram and another doctor shortly afterward because he was concerned that James had an infection in her left hip joint. At the time he ordered the consultations, Dr. Richards indicated that they were routine consultations, meaning the doctors had twenty-four hours to respond, as opposed to stat or emergency consultations, where the consulting doctors have thirty minutes to respond.

Around 3:00 p.m. that same day, Dr. Richards was told that there was free air in the soft tissue around James' hip joint, raising a concern about gas gangrene. Dr. Richards then called the hospital back and told the nurses that the consultations needed to occur as soon as possible. Dr. Richards testified that although he did not use the term stat, that was his intent. He saw James around 5:30 p.m. later that day and the consulting doctors had still not seen her. He did not directly contact the consulting doctors to find out why, but he testified that he was sure he spoke to a nurse about it. He received a call about James at 8:30 p.m. that night and at 2:30 a.m. the next morning, but the consultants had yet to see James. When Dr. Richards went to see James at the hospital between 6:00 and 7:00 a.m. on September 8, the consultations still had not been performed. Dr. Richards testified that at this time he told the nurse to re-notify the consultants and tell them about the seriousness of the infection.

Dr. Ikram, an orthopedic surgeon, testified that he received the page about James on September 7 a little after 3:00 p.m. He testified that he was told that James had localized cellulitis. Dr. Ikram testified that he always asks whether the call is an emergency and, based on his conversation with the nurse, he concluded that it was not an urgent matter. He testified that he was not told of the x-ray that found free air in James' hip joint and if he had been told this, he would have gone to see her immediately.

Dr. Ikram testified that he next received a page about James on September 8 around 10:50 a.m., while he was in surgery, and he gave a phone order about her treatment. Dr. Ikram examined James on September 8 around noon and at this point he was concerned about necrotizing fasciitis.[1] He performed surgery on James on September 8 at 4:05 p.m. and dissected an area of necrotic[2] tissue. He performed two more surgeries on James, each time finding more necrotic tissue. Dr. Ikram testified that on September 11, James was on a ventilator and cultures of tissue samples came back positive for cocci and positive for bacilli. On September 13, the infection was worsening. On September 18, James' family indicated that they wanted no further surgeries and only comfort management. James died on September 19, 2001 from sepsis[3] originating in her left hip area.

---

[1] Necrotizing fasciitis is defined as "a rare soft-tissue infection primarily involving the superficial fascia and resulting in extensive undermining of surrounding tissues; progress is often fulminant and may involve all soft-tissue components, including the skin; usually occurs post-operatively, after minor trauma, or after inadequate care of abscesses or cutaneous ulcers." Stedman's Medical Dictionary, p 632 (26th ed, 1995). Fascia is defined as "[a] sheet of fibrous tissue that envelops the body beneath the skin; it also encloses muscles and groups of muscles, and separates their several layers or groups." *Id*. at 628.

[2] Necrotic is "[p]ertaining to or affected by necrosis," which is defined as "[p]athologic death of one or more cells or a portion of tissue or organ, resulting from irreversible damage." Stedman's Medical Dictionary, pp 1178-1179 (26th ed, 1995).

[3] Sepsis is defined as "[t]he presence of various pus-forming and other pathogenic organisms, or their toxins, in the blood or tissues." Stedman's Medical Dictionary, p 1598 (26th ed, 1995).

Plaintiff argues that the trial court erred in dismissing the case on the basis that plaintiff's allegations in his affidavits of merit were too vague to comply with MCL 600.2912d. Because plaintiff's affidavits of merit complied with the statute's requirements, we agree and reverse. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In actions alleging medical malpractice, a plaintiff must file an affidavit of merit along with the complaint. MCL 600.2912d(1). The purpose of this requirement is to prevent frivolous claims of medical malpractice. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). The affidavit of merit must contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

In plaintiff's affidavits of merit, his experts averred that the standard of care required defendants to perform various functions specifically related to their treatment of plaintiff's decedent. For example, the affidavits charged that defendants failed to "monitor wound size and appearance," "perform diagnostic tests," "provide treatment to prevent exacerbation of disease," "provide timely surgical intervention," and "train, select, and monitor employees to diagnose necrotizing fasciitis." Given the early stages of litigation, these affidavits were specific enough to explain the gravamen of plaintiff's claim and lend professional credence to its legitimacy. See *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679; 684 NW2d 711 (2004); *Dorris*, *supra*. The affidavits stated that defendants breached the standard of care by failing to perform these tasks, and further stated that if defendants had performed them (provided test results to the treating surgeon, etc.), then they would have satisfied the standard of care. The affidavits concluded by stating that if James "had been provided with prompt, aggressive, and appropriate medical care in compliance with the allegations listed above, she would have had a greater than 50% chance of recovery." Therefore, the affidavits contain the elements required by the statutes, and the trial court erred when it held otherwise.

Unlike the notice of intent to file suit, which puts defendants on notice of a plaintiff's claim and promotes settlement, *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997), the purpose of an affidavit of merit is to prevent frivolous lawsuits. *Dorris*, *supra*. Defendants had received a notice of intent in this case and did not contest its adequacy. Defendants do not claim ignorance regarding the standard of care plaintiff asserts, rather they object merely to the form of the affidavits. Defendants argue that plaintiff failed to meet statutory standards that simply are not contained in the statutes, namely that the standards of care provided by the affiants must be specifically delineated and separately categorized according to

each defendant. This argument ignores the fact that the notices of intent already organized the standards of care as defendants would require and that the affiants expressly declared that they reviewed the notices of intent before reiterating their standards of care and attesting to them.

The purpose of an affidavit of merit is appreciably different than the purpose of a notice of intent, so the policy considerations are also different. A notice must alert a defendant of the basis for the claim, so it makes sense to require a high degree of specificity. An affidavit of merit accomplishes its purpose, however, when it demonstrates that the plaintiff's claims have received the support of similarly situated professionals. The affidavits at issue demonstrate this support, and defendants do not raise any legitimate claim of prejudice or confusion regarding which standards plaintiff asserts for which defendant. Therefore, unlike the court in *Roberts*, *supra*, we do not need to read additional requirements or limitations into the statute to aid its rational application or workability. In this case, plaintiff complied with the statute by providing each defendant with an affidavit of merit that contained the necessary statutory elements, and we see no reason to require more merely on the basis of our perception of what the Legislature may have intended, but did not specify. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591-592; 702 NW2d 539 (2005).

Defendants' arguments regarding *Apsey v Memorial Hosp (On Reconsideration*), 266 Mich App 666; 702 NW2d 870 (2005), also fail, because *Apsey*, according to its own terms, only applies prospectively. *Id*. at 682-683.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly